NO. 82-282

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IN THE

# Supreme Court of the United States

October Term, 1982

THOMAS C. McCain and WILLIAM SPENCER, individually and on behalf of all those similarly situated,

*Appellants,*

vs.

CHARLES E. LYBRAND, GENE HUIET, HENRY M. HERLONG, ROY A. HARLING, and W.T. TIMMERMAN, individually and as members of the County Council of Edgefield County; NORMAN DORN, JOHN S. EDWARDS, and Richard A. Beals, individually and as members of the Board of Election Commissioners of Edgefield County, S.C.; and J.M. PENDARVIS, individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA**

## APPELLANTS' BRIEF ON THE MERITS

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## QUESTIONS PRESENTED

1. Whether the district court erred in ruling that at-large elections adopted in 1966 for the Edgefield, South Carolina County Council had been pre-cleared pursuant to §5 of the Voting Rights Act of 1965, where the Attorney General informed State officials that the 1966 change had never been submitted or pre-cleared?

2. Whether pre-clearance under §5 of a 1971 submission expressly limited to an increase in size of the Council from three to five members, resulted in pre-clearance sub silentio of at-large elections adopted in 1966, where the submission contained no information to suggest to the Attorney General that the 1966 use of at-large voting was a change from any prior practice, and where the

Attorney General informed State officials that the 1966 change had never been submitted or precleared?

3. Whether a transfer of powers from State to Edgefield County elected officials pursuant to implementation of statewide home rule in 1966 is a voting change subject to pre-clearance under §5?

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## OPINION BELOW

The opinion of the three-judge court of the United States District Court for the District of South Carolina to be reviewed is unreported, and is contained in the Jurisdictional Statement Appendix ("Juris. S.A.") at 1a.

## JURISDICTION OF THE COURT

This is an appeal from a decision of a three-judge district court convened pursuant to §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c and 28 U.S.C. §2284. The decree sought to be reviewed was entered on May 10, 1982. The notice of appeal was filed in the United States District Court for the District of South Carolina on June 7, 1982. Juris. S.A. 23a. Jurisdiction of this appeal is conferred on this Court by 42 U.S.C.

§1973c and 28 U.S.C. §1253.

## STATUTORY PROVISION INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The statute is set out in full in the Juris. S. A. at 25a.

## STATEMENT OF FACTS

Edgefield County, South Carolina, is a small county on the Georgia line opposite the City of Augusta. Its population is 15,690, of whom 52% are black and 48% are white. Blacks, however, are a minority of the voting age population. J.A. 44.[1] Despite the large black population, no black person has ever been elected to the County Council--the principal governing body. J.A. 74.

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1. "J.A." refers to the Joint Appendix.

Appellants are black registered voters of Edgefield County, South Carolina, who seek to enforce §5 of the Voting Rights Act, 42 U.S.C. §1973c, and to require preclearance of at-large elections by the Edgefield County Council. The Appellees are the members of the Edgefield County Council and the Edgefield County Board of Election Commissioners, as well as the President of the Edgefield County Democratic Executive Committee. Juris. S.A. 2a.

The suit which gives rise to this appeal was filed on February 26, 1974. The original complaint alleged that the use of at-large elections to elect members of the Edgefield County Council diluted the votes of black voters, in violation of the First, Thirteenth, Fourteenth and Fifteenth amendments of the Constitution of the United States, and 42

U.S.C. §§ 1971, 1973, and 1983. J.A.1.[2] Subsequently, by orders entered November 24, 1980, and January 6, 1981, the complaint was supplemented to raise the claim that the at-large elections being used by Edgefield County have never been precleared pursuant to §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and must therefore be enjoined as illegal. J.A. 90, 102, 110, 119.

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2. The original complaint also alleged that the residential districts used for the at-large elections were malapportioned. Although the district court granted summary judgment to plaintiffs on this claim, that judgment was reversed by the court of appeals and this Court denied certiorari. See McCain v. Lybrand decided sub nom. Lytle v. Commissioners of Election of Union County, 376 F.Supp. 304 (D.S.C. 1974), rev'd, 509 F.2d 1049 (4th Cir. 1974), cert. denied sub nom. McCain v. Lybrand, 419 U.S. 1032 (1974). Following this Court's decision in Dallas County v. Reese, 421 U.S. 477 (1975), the malapportionment issue was eliminated from the instant case by a summary judgment for the Appellees.

Although this case has seen many proceedings, this appeal involves only the issue of preclearance under §5 of the Voting Rights Act. The facts relating to that issue center on three statutes, passed in 1966, 1971, and 1976, dealing with the county government of Edgefield County. The essential facts deal not only with the substance of those statutes but with their treatment under §5.

THE THREE STATUTES

A. The 1966 Statute--Act No. 1104.

Prior to November 1, 1964, the government of Edgefield County, known as the Board of County Commissioners, consisted of two Commissioners appointed by the Governor upon the recommendation of the members of the South Carolina General Assembly from the county, and the elected County Supervisor of Roads. The Board

had limited administrative duties, as well as general jurisdiction over roads and bridges. The principal powers, however, were retained by the members of the General Assembly from Edgefield County. J.A. 129-30, 142-53. And see Blanding v. DuBose, 509 F.Supp. 1334, 1335 (D.S.C. 1981), rev., 454 U.S. 393 (1982).

On June 1, 1966, the South Carolina General Assembly enacted Act No. 1104 abolishing the offices of County Commissioner and County Supervisor and creating the Edgefield County Council. The Council consisted of three members elected for terms of two years, with one member from each of three designated residency districts elected by plurality vote from the county at-large. J.A. 154-66. Act No. 1104 conferred the powers of home rule upon the Council and empowered it (unlike the former Board of Commissioners), among

other things, to buy or sell property, to exercise the powers of eminent domain, to make appropriations and levy taxes, to provide necessary county services, to receive and disburse funds, to incur indebtedness, to issue bonds, to prescribe methods of accounting for county officers and to employ county employees. Id., 142-53.

Edgefield County is a political subdivision subject to the prohibitions of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a), pursuant to the certification of the Attorney General of the United States under 42 U.S.C. §1973b(b). Juris. S.A. 6a; 28 C.F.R. Part 55. Act No. 1104 was a voting qualification or prerequisite to voting, or standard, practice or procedure different from that in force or effect in Edgefield County on November 1, 1964, within the meaning of §5. Id.;

J.A. 131.

As Appellees have stipulated, despite the fact that Act No. 1104 was a covered voting change, it was never submitted to the Department of Justice for preclearance or judicially reviewed by the District Court for the District of Columbia. J.A. 131; Juris. S.A. 6a.[3]

B. The 1971 Statute--Act No. 521.

Sections 1 and 3 of Act No. 1104 were amended on June 25, 1971, by Act No. 521. J.A. 167-70. The only change made by Act No. 521 was to increase the membership of the Council and the number of residential districts from three to five.[4] There was no change in any of the

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3. As appears infra at 16, the failure to preclear the 1966 Act was not disclosed until 1980.

4. Act No. 521 was entitled: "An Act to Amend Act 1104 of 1966, as Amended, FOOTNOTE CONTINUED ON NEXT PAGE....

powers of the Council, nor in the use of plurality vote and at-large elections. Id.

Act No. 521 was submitted to the Attorney General pursuant to §5 on July 21, 1971, along with 17 other pieces of legislation.[5] The July 21, 1971, letter merely listed the acts submitted by ratification and act number and date approved. It contained no further information of any kind.

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FOOTNOTE CONT'd...Relating To A System Of County Government For Edgefield County, So As To Increase The Number Of Districts And The Number Of County Council Members." J.A. 167.

5. A copy of the submission letter, which the parties had been unable to locate during the district court proceedings, was included in the appendix to the Brief for the United States As Amicus Curiae, 1a-2a. Act No. 521 is identified in the letter as H2206, the bill number in the House of Representatives of South Carolina. Although the letter is not part of the certified record, the district court entered an order on March 10, 1981, directing the Appellees to produce any subsequently discovered documents relating to the possible submission of Act No. 1104
FOOTNOTE CONTINUED ON NEXT PAGE...

On September 14, 1971, David Norman, Assistant Attorney General, wrote to James H. Quackenbush, Assistant Attorney General of South Carolina, requesting additional information in connection with the submission of Act No. 521 (H2206). J.A. 237-40. Mr. Norman asked for: "maps showing the boundaries of the County Council election districts under the existing statute as well as under H2206"; "population and registration statistics, by race, for the present election districts and the proposed election districts as well as a copy of the election statute now in force"; and, "the names, and race, of all candidates for County Council in the last two primary and general elections, and the results of these elections by

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FOOTNOTE CONT'd....of 1966. J.A. 127. The July letter falls within the category of documents described in the order and required to be produced.

districts." Id.

On September 24, 1971, Mr. Quackenbush forwarded the following additional information to the Attorney General: maps showing the boundaries of the County Council election districts under Act No. 1104 and Act No. 521 (H2206); registration statistics by race for the present and proposed election districts; a copy of Act 521; a copy of the first page of Act No. 1104 describing the existing three election districts; and, the names of candidates in the 1968 and 1970 primary and general elections and the results of the elections by district. J.A. 244-48. Population figures which had been requested for the existing and proposed election districts were not available. Id.

A month later, on November 24, 1971, the Attorney General precleared the increase in the size of the County Council.

The clearance letter provided simply that: "The Attorney General does not interpose any objections to the change in question." Juris. S.A. 43a.[6]

C. The 1976 Home Rule Ordinance

In 1975 the General Assembly of South Carolina enacted the Home Rule Act, §4-9-10 et seq., Code of Laws of South Carolina, 1976, as amended. The Home Rule law authorized five alternative forms of elected county government, and provided

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6. Act No. 1104 was also amended in 1967 by Act No. 55 to make it permissible for the County Council to hire a county administrator; in 1968 by Act No. 1318 to provide that Council votes be matters of public record; and in 1974 by Act No. 1042 setting a ceiling on salaries of council members, allowing the Council to make recommendations and appointments to boards and commissions and make recommendations concerning the farm to market program. J.A. 171-82. None of these acts is involved in this litigation.

that "each county...may prior to July 1, 1976, conduct a referendum to determine the wishes of the qualified voters as to the form of government to be selected...." §4-9-10(a). In the event no referendum were held, the legislation further provided that the county would have the form of government, including the method of election, "most nearly corresponding to the form in effect in the county immediately prior to that date," §4-9-10(b), which, in the case of Edgefield County, the General Assembly determined to be the council-administrator form. J.A. 133-35.

Referenda could be called under the Home Rule Act by the General Assembly, a resolution of the governing body or upon petition by not less than ten percent of the registered electors of the county. §4-9-10(a). There was substantial support for a referendum in Edgefield County among

the black voters who strongly favored the adoption of a single member district system of election, Juris. S.A. 36a, but even though they filed enough signatures to require a referendum, the County Council refused to call one and was upheld by the South Carolina Supreme Court. See McCain v. Edwards, 272 S.C. 539, 252 S.E. 2d 924 (1979).

Instead, on June 21, 1976, the County Council adopted by resolution and ordinance the council-administrator form of government, with at-large elections and residence requirements. J.A. 183-87. The resolution and ordinance were not initially submitted for preclearance under the Voting Rights Act, but after the Attorney General wrote in August and September 1978, requesting the submission, the County finally submitted the 1976 ordinance in 1978. J.A. 135-36.

On February 8, 1979, the Attorney General interposed an objection "to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in Edgefield County." Juris. S.A. 37a. In concluding that the county had failed to meet its burden of proof, the Attorney General analyzed both the effects of the election system, and the process by which home rule had been adopted. He emphasized that home rule had been originally conceived and presented as a significant transfer of power in a process that called for "the full and active participation of the electorate in selecting the type of government and the method of election through referenda called by the county council, the legislature...or... 10% of the registered electorate." Juris. S.A. 33a. In contrast, the Attorney

General noted, "the promise of public participation in the selection of the form of government and method of election under home rule has simply not been realized in Edgefield County." Juris. S.A. 36a.

Although the Attorney General's objection was followed by meetings, discussions, and consideration of plans for compliance, the County Council never complied with the objection. J.A. 189, 191, 195, 216.

D. The Disclosure That The 1966 Act Had Never Been Submitted.

On December 9, 1980, the Department of Justice notified the State of South Carolina that "[a] thorough investigation of our files and records has led us to conclude that this act [Act No. 1104 of 1966] was never submitted either to the United States District Court for the District of Columbia for judicial review

or to the Attorney General for administrative review as required by Section 5." Juris. S.A. 40a. The State was advised "it is necessary that this Act either be brought before the District Court for the District of Columbia or submitted to the Attorney General." 41a.

Appellees' failure to submit the 1966 Act establishing at-large elections for the County Council was not disclosed to Appellants until the "please submit" letter from the Department of Justice. Indeed, the county had previously taken the position that the 1966 legislation had in fact been precleared. In his letter of September 29, 1978 submitting Edgefield's implementation of home rule, the county attorney represented that the 1966 Act had been submitted and precleared by the Department of Justice:

> I am enclosing herewith an act of 1966 establishing the Edgefield County Council and amendments thereto in their chronological order, all of which have been approved by the Justice Department.

See J.A. 212-15. Appellees later stipulated that the 1966 Act had never been submitted nor precleared. J.A. 131.

STATEMENT OF THE CASE

The proceedings that resulted in this appeal were triggered by the Attorney General's 1980 letter requesting submission of Act No. 1104 of 1966, and by Edgefield County's failure to comply with the Attorney General's 1979 objection to the Home Rule ordinance.

This case had already been active even before these events. In 1975, there had been a major trial on Appellants' claims that the at-large elections diluted their votes on account of race.

On April 17, 1980, the district court ruled for Appellants on their dilution claim,[7] concluding that "the rights of the blacks to due process and equal protection of the law in connection with their voting rights have and continue to be unconstitutionally infringed." The district court's findings were detailed and comprehensive. J.A. 75.[8]

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7. The court explained the long delay between trial and issuance of the opinion on the grounds that it "was advised the South Carolina Legislature would adopt a new plan for Edgefield County." J.A. 36. Although the court did not elaborate, it was obviously referring to the implementation of home rule in Edgefield County.

8. The court found:

*A history of discrimination against blacks in registering and voting: "At the time of the passage of the Voting Rights Act in 1965 less than 20% of the voting age blacks of Edgefield County were registered." J.A. 46-7.

*Blacks were excluded from participating in Democratic Party affairs until 1947, and even then "blacks in Edgefield County found it very difficult to register

FOOTNOTE CONTINUED ON NEXT PAGE...

FOOTNOTE CONT'd...and threats were made against some blacks who did register." J.A. 47.

*Even though blacks were a majority of the population--but less than a majority of eligible or registered voters--no black had ever been elected to the County Council. J.A. 44-5, 74.

*"Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible.... The Court's overall finding is that blacks were virtually totally excluded up to 1970, and that since that time they have progressed to minimal tokenism." J.A. 49-50.

*"Examination of the election results shows an extraordinarily high correlation in every election between the votes received by a black candidate and the racial composition of the precinct.... There is bloc voting by the whites on a scale that this court has never before observed....whites absolutely refuse to vote for a black." J.A. 54-5, 71, 73.

*"Blacks were historically excluded from jury service in Edgefield County. As late as 1968 and 1970, the grand jury had no blacks at all, while the trial jury venires in those years had few blacks. It was not until suit was brought in 1971 that the jury list was reconstituted to include blacks fairly." J.A. 60.

*"The Edgefield County Council historically kept the county chain gang
FOOTNOTE CONTINUED ON NEXT PAGE...

FOOTNOTE CONT'd...segregated by race, until a suit was brought in 1971." Id.

*"Blacks have been excluded from county employment by the County Council, even up to the present. No current black employee began service before 1971. Until the very eve of trial in this case, black employment was negligible. It was only when trial was about to begin that the county suddenly began hiring blacks in any numbers...in addition, blacks are heavily concentrated at the lower wage levels. Of the last minute hires, none of the 11 blacks earns more than $5,460." J.A. 60-1.

*"Blacks have been excluded by the County Council in appointments to county boards and commissions." J.A. 61.

*"The public schools of Edgefield County were historically segregated by race....It was not until September, 1970 that any appreciable amount of desegregation took place, under a plan finally approved by the U.S. Department of HEW." J.A. 63-4.

*Even after desegregation, the school board maintained the racially discriminatory character of the schools. "Under the school board's 1970 plan, Strom Thurmond High, the formerly white school, was designated the high school for all students. It kept 'Confederate Rebel,' and 'Dixie' as the school nickname and school song, and kept the use of the Confederate Flag as the school symbol at athletic and other events." J.A. 64. After blacks complained, the "school board promptly resolved that 'the existing traditions now in force in all schools of the system will continue,'
FOOTNOTE CONTINUED ON NEXT PAGE...

Five days after the district court's order, this Court decided City of Mobile v. Bolden, 446 U.S. 55 (1980). The Appellees then moved to alter, amend or vacate the district court's April 17, 1980 Order, and the motion was granted on August 11, 1980. J.A. 84-9. The district court made no new

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FOOTNOTE CONT'd...and secured an ex parte injunction against blacks' gathering or demonstrating against the school policies. Blacks affected by the injunction were never able to obtain a hearing on their motion to dissolve the ex parte injunction, which led this court to vacate it. McCain v. Abel, CA No. 70-1057 (D.S.C. 1973)." J.A. 65.

*"Blacks in Edgefield County have a much lower socio-economic status than do whites. Blacks as a group have smaller incomes, less education and fewer employment opportunities." Id.

*"There is still a long history of racial discrimination in all areas of life." J.A. 71.

*"The County Council has not been responsive to the needs of black citizens, even though they make up a majority of the population of the county." J.A. 73.

evidentiary rulings but held that its findings did not add up to proof of discriminatory intent under Mobile. The district court offered the parties the opportunity to submit additional evidence on the intent issue, and set the case for rehearing.[9]

While these proceedings were taking place on the dilution claim, Appellants supplemented the complaint twice. On November 24, 1980, the complaint was supplemented with a §5 claim seeking to enforce the 1979 objection to the home rule ordinance, J.A. 90, 102; on January 6, 1981,

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9. Following the decision in Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982), and the amendment of §2 of the Voting Rights Act, 42 U.S.C. §1973, Appellants moved the district court to reinstate its April 17, 1980, Order. A hearing was held on November 5, 1982, and the motion was taken under advisement. Those constitutional and §2 issues are still pending in the district court and are not before this Court.

following disclosure of the fact that Act No. 1104 had never been pre-cleared, the complaint was further supplemented with a §5 claim based on the 1966 statute. J.A. 110, 119.[10]

A three-judge district court was convened to hear the §5 claims,[11] and on May 10, 1982, the three-judge court denied the

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10. Because of the different time frames involved in this case, Appellants have prepared a chronology of relevant events and included it as an appendix to this brief.

11. Appellants also moved to disqualify one of the panel members, Honorable Donald S. Russell on the principal ground that: he served in the United States Senate during the time the Voting Rights Act of 1965 was enacted -- he was one of 18 Senators voting against the Act, 111 Cong. Rec. S19374-78 (daily ed., Aug. 4, 1965) -- so that his "impartiality might reasonably be questioned" within the meaning of 28 U.S.C. §455(a) in a judicial proceeding to enforce §5. No personal bias or prejudice against the Appellants was asserted under 28 U.S.C. §144. Judge Russell denied the motion and the Court of Appeals for the Fourth Circuit subsequently denied Appellants' Petition for Writ of Mandamus filed on the same grounds. In re Thomas C. McCain and William Spencer, No. 81-1665 (4th Cir. August 5, 1981).

relief requested by Appellants on the grounds that the §5 requirements had been met. Juris. S.A. 1a. In reaching this decision, the district court began by recognizing that

> [t]here is no dispute that Act No. 1104 of 1966 was subject to the preclearance provision of §5 of the Act and that county officials should have, but did not, submit the Act to the Justice Department or to the District Court for the District of Columbia for preclearance.
> Juris. S.A. 62.

Nonetheless, the court found that "defendants are not required to submit the 1966 Act to the Attorney General of the United States for preclearance, since its provisions, including at-large voting, have been approved by the said Attorney General in preclearing the 1971 Act." Juris. S.A. 20a.

The district court's conclusion that the Attorney General precleared the 1966 Act when he precleared the 1971 Act was based on two grounds. First, the district

court reviewed the information submitted and apparently found as a matter of fact that the Attorney General, in preclearing the 1971 increase in size of the Council, knew that at-large elections were a post-Voting Rights Act change which had never been precleared and knowingly, intentionally precleared those elections in his 1971 letter.

> Plaintiffs' arguments would require this court to find that the Attorney General did not consider the effect of at-large, as opposed to district, voting when he elected not to object to 1971 Act No. 521. Analysis of both the facts before the Attorney General and his requests for additional information do not bear out plaintiffs' arguments. Juris S.A. 10a.

Instead, according to the district court,

> [a]lthough 1971 Act No. 521 is entitled, 'An Act To Amend Act 1104 of 1966...So As To Increase The Number of Districts And The Number of County Council Members,' every indication is that the Attorney General did not limit his

> consideration of the Act to the change in number of districts and number of council members. Id.

The principal basis for this "finding" is an exchange of correspondence between the Justice Department and the State of South Carolina in which additional information was requested and received. The additional information included a copy of the first page of the 1966 statute and the results and name and race of candidates for the two previous primary and general elections -- i.e., 1968 and 1970. Juris. S.A. 11a. Based upon this information, the district court found as a fact that the Attorney General's review of the 1971 change was a review of the entire election system that had been adopted in 1966.

> The information requested and received by Norman indicates that he had the 1966 Act before him and was aware that the form and method of election of the Edgefield County Council then in effect had been adopted in 1966. Norman's letter requesting infor-

> tion about the former districts and results of elections by race indicates that Justice Department review of Act No. 521 encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966. Juris. S.A. 12a.

In addition to this factual analysis of what the Attorney General knew and intended to decide in 1971, the district court also held as a second ground that the language of the 1971 statute compelled a holding that the Attorney General precleared the unchanged portions of the election system.

> Although Act No. 521 changed only the number of residency districts and members of the council, the Act provides for the 'striking out' of all provisions of the 1966 Act dealing with the form and method of electing county council. Juris S.A. 13a.

Turning to the home rule ordinance, the district court held that the Attorney General's 1979 objection was a nullity

because the 1976 ordinance was not a voting change. The court made this finding, not because the adoption of home rule was not a change, but because it found as a fact that the Attorney General's 1975 preclearance of the state-wide home rule authorizing legislation effectively precleared all aspects of Edgefield County's adoption of home rule. Juris. S.A. 17a. The district court rejected the claim that it was improperly reviewing the Attorney General's preclearance decision by holding in effect that Morris v. Gressette, 432 U.S. 491 (1971) barred review of an Attorney General's decision only by voters, not by a jurisdiction, and whether or not home rule was a change was an issue within the jurisdiction of the district court. Juris. S.A. 14a-6a.

Based on this series of factual and legal determinations, the district court

held that the adoption of at-large elections in Edgefield County had been properly approved by the Attorney General and, therefore, meets all §5 requirements.

Probable jurisdiction was noted by this court on June 20, 1983, after requesting and receiving a Brief for the United States as Amicus Curiae.

## SUMMARY OF ARGUMENT

The 1966 change in the form and method of selection of government for Edgefield County, South Carolina, from an appointed Board of Commissioners to an elected at-large County Council, was never submitted or precleared as required by §5 of the Voting Rights Act of 1965. The subsequent preclearance in 1971 by the Attorney General of a voting change expressly limited to increase in the size of the Council from three to five members did not result in preclearance sub silentio of the adoption of at-large elections in 1966.

The Attorney General has requested the Appellees to submit the 1966 change involving the adoption of at-large elections for preclearance, and has ruled that (1) the 1971 submission of the increase in size of the Council was not a submission of the adoption of at-large elections in 1966, and (2) he did not, in fact, treat

the 1971 submission as one involving the adoption of at-large elections. Brief for the United States as Amicus Curiae at 7-12. The rulings by the Attorney General in this case, which were disregarded by the district court, are reasonable and represent a consistent interpretation by the Department of Justice of §5. The Attorney General's rulings are entitled to deference. Blanding v. DuBose, 454 U.S. 393, 401 (1982).

The decisions of this Court require that covered jurisdictions, such as Edgefield County, submit any proposed voting changes to the Attorney General in an "unambiguous and recordable manner...with a request for his consideration pursuant to the Act." Allen v. State Board of Elections, 393 U.S. 544, 571 (1969). In accord, United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110 (1978); City of Rome v. United States,

446 U.S. 156 (1980). The record in this case reveals a total failure by Appellees to comply with the submission requirements of §5 and the relevant decisions of this Court.

The information submitted by Edgefield County contained absolutely nothing to enable the Attorney General to determine whether the 1966 practice was different from that in effect on November 1, 1964, the relevant date of comparison for preclearance under §5. City of Lockhart v. United States, ___ U.S. ___, 103 S.Ct. 998 (1983). The district court erred by holding that comparison of the 1966 change with the practice in effect in 1971 resulted in preclearance of the 1966 change as a matter of law under §5.

The opinion of the district court is contrary to Congressional policy and the decisions of this Court which have rejected any notion of constructive preclearance

under §5, but have placed upon covered jurisdictions the burden of seeking approval of all voting changes and showing that they are not discriminatory. City of Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

The implementation of statewide home rule in Edgefield County in 1976 continued the use of uncleared at-large voting in violation of §5. Berry v. Doles, 438 U.S. 190 (1978).

The Attorney General, contrary to the holding of the lower court, did not approve the transfer of powers from state to local officials when the Home Rule Act was submitted for preclearance in 1975. Brief for the United States As Amicus Curiae, at 13 n. 10. Accordingly, the 1976 transfer of powers in Edgefield County was a change in voting and the Attorney General's objection should be enforced.

## ARGUMENT

### I. THE 1966 CHANGE IN FORM OF GOVERNMENT AND THE ADOPTION OF AT-LARGE ELECTIONS FOR THE EDGEFIELD COUNTY COUNCIL HAS NEVER BEEN SUBMITTED FOR §5 REVIEW AND HAS NEVER BEEN PRECLEARED.

The parties are agreed, and the three-judge court found, that (1) Edgefield County is subject to the preclearance provision of §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c;[12] (2) Act No. 1104 of 1966, establishing a new form of government for Edgefield County (i.e. a three member County Council elected at-large to replace a Board of County Commissioners consisting of an elected County Supervisor and two Commissioners appointed by the Governor upon the recommendation of the county's state legislative delegation), was a

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12. Juris S.A. 6a; J.A. 131. See also South Carolina v. Katzenbach, 383 U.S. 301, 318 (1965); and 28 C.F.R. Part 51.

change in voting within the meaning of §5;[13] and (3) Act No. 1104 was never submitted for preclearance to the Attorney General or the District Court for the District of Columbia.[14]

Despite these admitted facts, the three-judge court ruled the 1966 Act was not subject to preclearance because (1) the Attorney General as a matter of fact approved the at-large method of elections

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13. Juris S.A. 6a; J.A. 131. See Blanding v. DuBose, 454 U.S. 393, 395 (1982), finding that an analogous statute enacted by the General Assembly of South Carolina in 1967 "that established a new form of government for Sumter County" required preclearance under §5; Horry County v. United States, 449 F.Supp. 990, 995 (D.D.C. 1978)("State's enactments [effecting Horry County, South Carolina] which require that a governing body which was formerly appointed would in the future be elected constitute a new voting standard, practice, and procedure within the state...subject to the preclearance requirements of Section 5."); and 28 C.F.R. Part 51, §51.12(i), defining changes in voting as including those effecting "the term of an elective office or an elected official or in the offices that are elective."

14. Juris S.A. 6a; J.A. 131.

adopted in 1966 when he approved an increase in the size of the Council from three to five in 1971, Juris. S.A. 12, and (2) approval of the 1971 Act as a matter of law resulted in preclearance of the 1966 adoption of at-large elections.

> The Attorney General's approval of these new provisions also renders moot any objection to the superceded 1966 provisions. Juris. S.A. 13a.

The decision of the court below is contrary to the rulings by the Attorney General that the 1966 Act has never been considered or precleared, the opinions of this Court governing the submission and consideration of voting changes and Congressional purpose in enacting the Voting Rights Act.

A. The Attorney General Ruled That The 1966 Act Has Never Been Precleared, A Decision Which Is Entitled to Deference.

The Department of Justice notified officials of the State of South Carolina by letter on December 9, 1980, that the 1966

Act had never been submitted or precleared and that preclearance under §5 was required. Juris. S.A. 40a-1a. The Attorney General's ruling was subsequently reaffirmed by the United States in its amicus curiae brief filed at the request of this court:

> the Attorney General's letter of December 12 [sic], 1980, correctly advised South Carolina officials that the 1966 Act had never been submitted to the Attorney General or the District Court for the District of Columbia for preclearance.

Brief for the United States As Amicus Curiae at 12 n.8. Because the Attorney General never requested or received any information concerning the pre-1966 method of elections, of necessity he "was in no position to evaluate or preclear the at-large feature encompassed in the 1971 Act." Id. at 11.

The Attorney General's "please submit" letter and the amicus brief filed by the United States show that the Attorney General (1) does not regard the 1971 sub-

mission of the increase in size of the Council as a submission of the change in form of government and the adoption of at-large elections enacted in 1966,[15] and (2) did not, in fact, treat the 1971 submission as one involving a change in the form of government or the adoption of at-large elections. The December letter and amicus brief directly contradict the lower court's assertion that "every indication is that the Attorney General did not limit his consideration of the Act to the change in number of council members." Juris. S.A. 10a. But according to the Attorney General, he did precisely that.

This Court has frequently emphasized

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15. The State of South Carolina was advised, for example, that if it elected to seek preclearance of the 1966 Act by submission to the Attorney General, to "please follow the procedures set forth in the Procedures for the Administration of Section 5 (28 C.F.R. Part 51.)" Juris. S.A. 41a.

that the administration and interpretation of §5 by the Attorney General are entitled to deference from the courts. United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110, 131 (1978); Blanding v. DuBose, 454 U.S. 393, 401 (1982). Here, the determination by the Attorney General that the 1966 Act had never been submitted, considered or precleared (a determination which the district court simply disregarded) is a reasonable interpretation of §5.[16] The Attorney General's ruling is entitled to deference, and nothing in the record suggests any basis for disagreeing with it.

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16. The facts in this case are clearly distinguishable from those in United States v. Georgia, Civ. No. C76-1531A (N.D. Ga. Sept. 30, 1977), aff'd, 436 U.S. 941 (1978). There, the three-judge court ruled that the voting changes at issue had been submitted and precleared in light of a March 30, 1973, letter from the Attorney General stating that one of the two changes had been precleared in 1970, and a court of appeals decision, Pitts v. Cates, 536 F.2d 56, 57 FOOTNOTE CONTINUED ON NEXT PAGE...

1. The Ruling By The Attorney General In This Case Is Entirely Consistent With The Attorney General's Regulations For The Administration of §5.

The regulations adopted by the Attorney General for administration of §5, whose use has been approved by this Court, see, e.g., Georgia v. United States, 411 U.S. 526, 536 (1973), and Blanding v. DuBose, supra, are fully consistent with the Attorney General's ruling in this case. The guidelines were published in their final form on September 10, 1971 (36 Fed. Reg. 18186 et seq.), two weeks before South Carolina responded to the Department of Justice's request for additional information concerning the 1971 submission. Moreover, proposed guidelines were published for comment in May 28, 1971 (36 Fed. Reg. 9781 et seq.), nearly two

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FOOTNOTE CONT'd...(5th Cir. 1976), indicating that the second change had also been precleared.

months before the 1971 change was first submitted.

The guidelines are unambiguous and require that submissions "clearly set forth" the nature of proposed voting changes and that the Attorney General be provided "[a]n explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting." 28 C.F.R. §§ 51.5, 51.10(a)(4).[17] There can

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17. The guidelines were revised on January 6, 1981, 28 C.F.R. Part 51, and continue to require a clear description of voting changes for which preclearance is sought: "Each submission should contain ....(b) If the change affecting voting is not readily apparent on the face of the documents provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explana-
FOOTNOTE CONTINUED NEXT PAGE...

be no contention that there was any clear statement of the 1966 change from appointed to elected government and the adoption of at-large elections in the initial 1971 submission or in the material subsequently provided the Attorney General. Indeed, there was no statement of such a change at all.

The Attorney General's ruling in this case that the 1966 change was not submitted or precleared conforms to the regulations for administration of §5, and reflects a consistent, reasonable policy in the administration of the statute. The Attorney General's ruling is entitled to deference. Blanding v. DuBose, supra.

B. The 1966 Act Was Never Submitted For Preclearance.

Although §5 itself prescribes no formal procedures for the submission of voting

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FOOTNOTE CONT'd...tory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." 28 C.F.R. §51.25.

changes to the Attorney General,[18] this Court, beginning with Allen v. State Board of Elections, 393 U.S. 544, 571 (1969), and before the promulgation by the Justice Department of guidelines for the administration of §5, established the general requirement that submitting jurisdictions give the Attorney General "an adequate opportunity" to determine the purpose or effect of any proposed new voting practice. In Allen, the State of Mississippi contended that once it had served a copy of its brief on the Attorney General the voting changes at issue had been "submitted" for purposes of §5, and that the Attorney General having failed to

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18. Section 5 provides merely that a new voting practice may be implemented if it "has been submitted...to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or...the Attorney General has affirmatively indicated that such objection will not be made." 42 U.S.C. §1973c.

interpose an objection within 60 days, the changes must be deemed pre-cleared. This Court rejected such a narrow construction of the "has been submitted" requirement of §5. It held that:

> A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.
> 393 U.S. at 571.

The "unambiguous and recordable manner" requirement of Allen has been consistently applied by this Court. In United States v. Board of Commissioners of Sheffield, Ala., supra, the City of Sheffield in a §5 submission letter requested permission to hold a referendum whether its commission form of government should be changed in favor of the mayor and alderman form. The letter further provided that if the referendum were approved the mayor-aldermanic form that existed in 1912

would be automatically reinstated. 435 U.S. at 114 n.5. The Attorney General precleared the holding of the referendum and the change in form of government was approved by the voters. The city then sought to implement the new form of government without additional pre-clearance arguing that approval of the referendum constitued approval of the change in form of government as well. This Court disagreed. It held that "the Attorney General, quite properly, treated Sheffield as having sought prior clearance only of the referendum," and that the lower court erred in concluding that the Attorney General "has to be understood as having approved" the adoption of the new form of government. 435 U.S. at 138. The Court reasoned that "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly sub-

mitted nor in fact evaluated by him." 435 U.S. at 136.

Allen and Board of Commissioners of Sheffield, Ala. were subsequently applied in City of Rome v. United States, 446 U.S. 156 (1980). There, the City of Rome argued that the submission and preclearance of a comprehensive municipal election code by the State of Georgia deferring to local charters regarding majority vote and numbered post requirements constituted preclearance of such procedures implemented by the City of Rome. The argument was unavailing.

> [T]he State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only of 'its decision to defer to local charters and ordinances regarding majority vote, runoff elections, and numbered posts, 'and' did not... submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues.'
> 446 U.S. at 169 n.6.

Edgefield County's 1971 submission of a change expressly limited to an increase in the size of the Council was not an unambiguous and recordable request for preclearance of the 1966 change in the form and method of election of government. The submission informed the Attorney General only that the county wished to enlarge its government from three to five members, but it did not inform the Attorney General in any way that the county had also made a change in 1966 from appointed to elected at-large government and that preclearance of that change was also being sought.[18] The failure of the Appellees to request

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18. The lower court attached great importance to the fact that in preclearing the 1971 change, the Attorney General requested, and "had...before him," a copy of the 1966 Act. Juris. S.A. 12a. Actually, the State sent the Attorney General only the first page (out of five) of the 1966 Act describing the three council districts, but omitting any description of the new powers of the council. J.A. 252-55. The fact that FOOTNOTE CONTINUED ON NEXT PAGE...

preclearance of the change in form and method of election of county government is fatal to their claim that the change was approved by preclearance of the 1971 increase in Council size.

C. Neither Congress Nor This Court Has Authorized Constructive Pre-Clearance Of Voting Changes.

Reduced to its essentials, the lower court's ruling is that the Attorney General is charged with constructive knowledge that the 1966 Act was a voting practice different from that in force or effect on November 1, 1964, and that the 60 day preclearance period began to run from the date of such notice. This Court, however, has never approved constructive preclearance but has required compliance with the actual notice requirements of §5.

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FOOTNOTE CONT'd...the entire Act was not submitted is merely additional evidence that the State itself regarded the 1971 submission as involving only an increase in size of the Council.

In United States v. Board of Commissioners of Sheffield, Ala., 430 F.Supp. 786, 789 (N.D. Ala. 1976), the three-judge court ruled that the Attorney General had "actual or constructive knowledge" that approval of a referendum involving a change in form of city government would result under state law in the adoption of at-large elections, and that approval of the referendum resulted in the constructive preclearance of at-large voting. This Court characterized the reasoning of the lower court as "extreme" and reversed.

> The District Court's conclusion that the Attorney General should have known of this provision of Alabama law would be sustainable only if we were to take the extreme position that the Attorney General should be charged with notice of all provisions of local law. United States v. Board of Commissioners of Sheffield, Ala., supra, 435 U.S. at 137 n.28.

Taken to its logical conclusion, the rationale of the lower court would amount to the repeal of the submission requirement of

§5 and place upon the Attorney General the burden of initiating review of all voting changes. If the Attorney General is deemed to have constructive knowledge of state law, then the 60 day preclearance period would begin to run automatically upon passage by any of the covered jurisdictions of new voting practices and procedures. But that is not the submission scheme enacted by Congress and approved by this Court in South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966).

D. The Lower Court Improperly Held That The 1966 Act Was Precleared In The Context Of The 1971 Act, Rather Than By Reference To The Practice In Effect In Edgefield County On November 1, 1964.

The lower court ruled that the Attorney General precleared a post-November 1, 1964, voting practice (a 1966 change from an appointed County Commission to an elected at-large County Council) when he precleared another post-November 1, 1964, voting prac-

tice (a 1971 increase in size of the Council from three to five members). The court reasoned that the "Justice Department's review of Act No. 521 [the 1971 Act] encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966." Juris. S.A. 12a. Section 5 and the decisions of this Court provide, however, that the appropriate basis for comparison under the statute is not between two post-Voting Rights Act practices, but between a new practice and the practice in effect on November 1, 1964. Perkins v. Matthews, 400 U.S. 379, 395 (1971); Hathorn v. Lovorn, 457 U.S. 255,102 S.Ct. 2421, 2428 n.16 (1982); City of Lockhart v. United States, ___ U.S. ___, 103 S.Ct. 998, 1002 (1983).

The only way the 1966 Act could have been precleared consistent with §5 would

have been by comparing it with the practice in effect in Edgefield County on November 1, 1964. There was, however, absolutely nothing in the submission from South Carolina to indicate what that practice was.

The Attorney General, as noted supra at 37, has consistently taken the position that the 1966 Act was never submitted, considered or precleared. The effect of the lower court's ruling,therefore, is that a post-Voting Rights Act enactment (the 1966 Act) is precleared as a matter of law if it is compared with a subsequent, precleared enactment (the 1971 Act). The reasoning of the district court, however, overlooks the fact that Congress established November 1, 1964, as the relevant date of comparison of Voting changes. The decision of the lower court is antithetical to §5 and should be set aside.

The alternate basis for the court's ruling is even more flawed. It held that

the 1971 Act substituted "completely new provisions for the form and method of election of Edgefield County Council, including provisions for the at-large with residency requirement form of election," and that the Attorney General's preclearance "of these new provisions also renders moot any objection to the superceded 1966 provisions." Juris. S.A. 13a. In essence, the court ruled that post-Voting Rights Act changes are precleared as a matter of law by being compared only with themselves -- or without being compared to anything at all.

## II. THE 1976 IMPLEMENTATION OF HOME RULE.

### A. The Implementation Of At-Large Elections In The Context Of Home Rule In Edgefield County Was A Continuing §5 Violation.

The district court held that the implementation of at-large elections in the context of home rule in Edgefield County in 1976 was "not a change subject to §5 pre-

clearance." Juris. S.A. 17a.[19] However, if Appellants are correct that the adoption of at-large elections for the County Council in 1966 was never submitted or precleared, then it necessarily follows that the implementation of at-large elections in the context of home rule in 1976 was also a voting change subject to the preclearance requirements of §5. The requirement of complying with §5 is a continuing one, Berry v. Doles, 438 U.S. 190, 195 n.1 (1978)(concurring opinion of J. Brennan), and neither Appellees nor the court below has suggested that

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19. In reaching this conclusion the court contradicted the logic of its earlier ruling that the 1971 Act substituted "completely new provisions for the form and method of election of Edgefield County Council." Juris. S.A. 13a. If the 1971 Act was a new enactment, then logically so was the 1976 implementation of home rule. By the same token, if home rule merely continued at-large voting, as the lower court held, then so did the 1971 Act, with the result that there was no voting change in 1971 involving at-large elections that could have been precleared.

merely reenacting an unsubmitted voting practice obviates the need for §5 review.

The lower court, if it erred in finding that the 1966 Act had been precleared, also erred in finding that the implementation of at-large voting in the context of home rule was not a voting change. Accordingly, the court below should be reversed and Appellees enjoined from using the at-large method adopted under home rule absent preclearance. Perkins v. Matthews, 400 U. U.S. 379, 397 (1971).

B. The Attorney General's Objection To 1976 Home Rule Should Be Enforced.

The lower court, relying upon Woods v. Hamilton, 473 F.Supp. 641 (D.S.C. 1979), concluded that the Attorney General had previously approved all aspects of home rule implementation in Edgefield County when he precleared the statewide Home Rule Act in

1976.[20] The Attorney General, however, disagrees with the district court.[21]

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20. Woods held that the transfer of powers from state to Charleston County officials under the Home Rule Act in South Carolina had been effectively precleared by the Attorney General on June 27, 1975, when he (1) precleared the holding of referenda under the Act, (2) reserved the right to object to the choice of form of government by individual counties, and (3) was silent as to the transfer of powers. According to the district court in this case, Woods "expressly rejected" the analysis of an earlier case from the District Court for the District of Columbia, Horry County v. United States, 449 F.Supp. 990, 995 (D.D.C. 1978), which held the post-1975 transfer of powers in Horry County, South Carolina under the Home Rule Act was a voting change subject to preclearnace. In Horry County there was no discussion of whether the Attorney General had precleared the transfer of powers when the Home Rule Act was submitted to him in 1975, although if he had, there would have been no basis upon which the District of Columbia court could have found that additional preclearance was required.

21. The United States did not appeal from the adverse ruling in Woods and contends that as a result it is estopped in this case from relitigating the issue whether the transfer of powers was precleared in 1975. Brief for the United States As Amicus FOOTNOTE CONTINUED ON NEXT PAGE...

According to the Brief for the United States as Amicus Curiae, at 13 n.10:

> In Woods v. Hamilton, supra,... we took the position that the Attorney General had not precleared the transfer of powers feature of the Home Rule Act that was submitted to him in 1975. We argued that the Attorney General had precleared only the holding of referenda to determine whether to change the form of local government...while reserving the right to review each county's subsequent implementation of all other aspects of the Home Rule Act.

The Attorney General's determination that the transfer of powers had not been precleared is reasonable and is entitled to deference. United States v. Board of Commissioners of Sheffield, Ala., supra, 435 U.S. at 131.[22]

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FOOTNOTE CONT'd...Curiae, at 13 n.10. Appellants, however, were not parties in Woods and are therefore not bound by that decision but may present the transfer of powers issue to this Court for review on appeal. Hathorn v. Lovorn, supra, 102 S.Ct. at 2430 N.23.

22. Subsequent to Woods, the Attorney
FOOTNOTE CONTINUED ON NEXT PAGE...

This Court, however, need not reach the issue whether the 1976 transfer of powers is a covered change and whether the Attorney General's objection is enforceable. If Appellants are correct that the 1966 Act was never precleared, then the 1976 Home Rule Ordinance would be a continuation of uncleared voting practices and could not be implemented. If, however, the Court finds that the 1966 Act was precleared, then the Attorney General's objection should be enforced with the result that Edgefield would revert to the voting practices precleared in 1971, i.e., a five member Council elected at-large with 1971, but not 1976, home rule powers.

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FOOTNOTE CONT'd...General revised the guidelines for administration of §5 in 1981 to reiterate that local implementation of precleared enabling legislation and contingent or non-uniform requirements were subject to §5 review. 28 C.F.R. §51.14.

## III. THE OPINION BELOW IS CONTRARY TO CONGRESSIONAL POLICY IN ENACTING THE VOTING RIGHTS ACT.

Congress intended for §5 to be a powerful and effective remedy for discrimination in voting, one that would "shift the advantage of time and inertia from the perpetrators of the evil to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). "Fearing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination," Hathorn v. Lovorn, supra, 102 S.Ct. at 2429, Congress froze the election laws of those jurisdictions, and placed upon them the burden of proving that any proposed new changes in voting have neither the purpose nor effect of discriminating before they could be implemented. City of Rome v. United States, supra, 446 U.S. at 183 n.18.

Whether or not to extend §5 was carefully considered by Congress in 1970,

1975 and most recently in 1982. On each occasion, Congress expressed its fear that the fragile gains in minority political participation would be eroded by the use of new discriminatory procedures, and voted to extend the preclearance requirement. House Report No. 91-373, 91st Cong., 2d Sess. (1970), 2 U.S. Cong. and Admin. News 3284 (1970)("Section 5... provides an important safeguard that new subterfuges will be promptly discovered and enjoined."); House Report No. 94-196, 94th Cong., 1st Sess., 10-1 (1975); Senate Report No. 94-295, 94th Cong., 1st Sess., 19 (1975)("it is Section 5 which serves to insure that this progress shall not be destroyed through new procedures and techniques. Now is not the time to jeopardize this progress through the removal of these crucial preclearance protections."); Senate Report No. 97-417,

97th Cong., 2d Sess., 10 (1982)("Continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial [§5] safeguards now.")

Consistent with Congressional policy this Court has given §5 "the broadest possible scope...to reach any state enactment which alters the election law of a covered state in even a minor way," Allen v. State Board of Elections, supra, 393 U.S. at 566-67; Dougherty County v. White, 439 U.S. 32, 38-9 (1978), and has required strict compliance with the submission requirements of the statute. United States v. Board of Commissioners of Sheffield, Ala., supra.

The lower court's opinion is inconsistent with Congressional voting rights policy and the implementing decisions of this Court. It allows covered jurisdictions to do precisely what Congress intend-

ed for them not to do -- devise new forms of discrimination in voting. Under the district court's formulation, a jurisdiction could enact a blatantly discriminatory new election procedure but fail to submit it for preclearance. It could then enact a racially nonregressive amendment to the act and seek preclearance of that. If the amendment were precleared -- which it would have to be under Beer v. United States, 425 U.S. 130 (1975), and see City of Lockhart v. United States, supra, 103 S.Ct. at 1004 -- the jurisdiction could then implement the underlying discriminatory change free and clear of §5 on the theory that it was precleared sub silentio, despite the fact that such change was never submitted, was never considered and was never approved by the Attorney General.

The lower court's opinion allows covered jurisdictions to make a shell

game out of §5 in which every submission, no matter how benign it appeared on the surface, might conceal a new, crippling form of discrimination in voting. The Department of Justice would then have to guess as to which submissions likely concealed discriminatory practices, or request the submission of all a jurisdiction's voting laws to make a judgment as to concealed, unsubmitted changes, or disallow voting changes altogether for fear of preclearing undisclosed discriminatory practices. None of these courses were contemplated by Congress when it placed upon the submitting jurisdictions the duty of identifying and submitting their voting changes for preclearance.

The lower court's opinion violates the intent of Congress and the decisions of this Court construing §5. It should be set aside.

## CONCLUSION

The Court should reverse the judgment below and enjoin further use of at-large elections for the Edgefield County Council until such time as Appellees comply with the preclearance provisions of §5 of the Voting Rights Act of 1965.

Respectfully submitted,

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## CHRONOLOGY OF RELEVANT EVENTS

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| June 1, 1966 | Act No. 1104 enacted, without preclearance, abolishing the appointed Edgefield County Board of Commissioners and establishing the elected at-large County Council. |
| June 25, 1971 | Act No. 521 enacted increasing the size of the Council from three to five members. |
| November 24, 1971 | Act No. 521 precleared by the Attorney General. |
| February 26, 1974 | Complaint filed alleging vote dilution and malapportionment of Council residency districts. |
| May 16, 1974 | District court granted appellants summary judgment on malapportionment claim. |
| June 17, 1974 | Court of appeals reversed. |

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| November 25, 1974 | Petition for writ of certiorari denied. |
| June 15, 1975 | Home Rule Act enacted requiring counties to adopt one of five designated forms of government. |
| November 24-25, 1975 | Appellants' dilution claim tried by district court. |
| April 14, 1976 | District court denied Appellants' motion for injunction pending decision on the merits. |
| May 13 and 19, 1976 | Edgefield County blacks filed petitions calling for referendum on implementation of home rule, but county officials refused to call an election. |
| June 21, 1976 | Council enacted home rule ordinance adopting |

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| | council-administrator form of government elected at-large. |
| February 8, 1979 | Attorney General objected to implementation of home rule in the context of at-large elections for the Edgefield County Council. |
| April 17, 1980 | District court ruled at-large elections for the Council diluted black voting strength. |
| April 25, 1980 | Appellees moved to alter or amend judgment based upon City of Mobile v. Bolden, 446 U.S. 55 (1980). |
| August 11, 1980 | District court vacated April 17, 1980 Order. |
| November 24, 1980 | Appellants amended complaint to enforce §5 |

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| | objection. |
| December 9, 1980 | Attorney General requested state officials to submit Act No. 1104 of 1966 for preclearance. |
| January 6, 1981 | Appellants amended complaint to enjoin use of Act No. 1104 of 1966 absent preclearance. |
| April 30, 1982 | Appellants filed motion for injunction pending trial on the merits. |
| May 11, 1982 | Three-judge court denied relief on Appellants' §5 claims. |
| May 11, 1982 | Single judge court denied Appellants' motion for preliminary injunction. |
| June 7, 1982 | Appellants appealed §5 issues to Supreme Court. |
| July 29, 1982 | Appellants moved to re- |

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| | instate April judgment on their dilution claim in light of the amendment of §2 of the Voting Rights Act, 42 U.S.C. §1973, and the decision in Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). |
| November 5, 1982 | Appellants' motion to reinstate judgment heard and taken under advisement by single judge court. |
| June 20, 1983 | Probable jurisdiction noted by Supreme Court |